ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

ROGER DALE STAFFORD, Petitioner,	)	83-6125
v.	)	Case No. A-418
THE STATE OF OKLAHOMA, Respondent.	)	

WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS
PETITION FOR WRIT OF CERTIORARI

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HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Petitioner requested through his appellate counsel, an evidentiary hearing to determine the effectiveness of his trial counsel for purposes of appellate review. The Oklahoma Court of Criminal Appeals denied this request and stated in its opinion affirming petitioner's conviction and sentence that they did not need an evidentiary hearint to determine effectiveness of counsel's representation, thereby denying petitioner his Sixth Amendment right.

2. Counsel for petitioner objected to the trial testimony given by petitioner's wife which was overruled by trial court and approved by Oklahoma Court of Criminal Appeals. This invaded petitioner's right to remain silent as guaranteed by the Fifth and Fourteenth Amendments of the Constitution.

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IN THE SUPREME COURT OF THE UNITED STATES

ROGER DALE STAFFORD,	)	
	)	
Petitioner,	)	
	)	
-vs-	)	Case No. A-418
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

PETITION FOR WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Oklahoma Court of Criminal Appeals entered in this case on the 20th day of June, 1983.

OPINION BELOW

The opinion of the oklahoma Court of Criminal Appeals was published and appears at 669 P2d 285. It is annexed as Appendix A to this petition. The order denying rehearing is unreported. It is annexed as Appendix B. to this petition.

JURISDICTION

The judgment of the Court of Criminal Appeals was entered on September 7, 1983. A timely petition for rehearing was denied on October 6, 1983. The Honorable Byron R. White, Associate Justice of the Supreme Court of the United States, extended time to file this Petition for Writ of Certiorari until January 4, 1984, by order dated December 1, 1983, A-418. Appendix C. Jurisdiction of this Court is invoked under 28 U.S.C. §1257[3].

CONSTITUTIONAL STATUTORY PROVISIONS INVOLVED IN THIS CASE

This case involves the Fourteenth Amendment to the Constitution of the United States which provides, in relevant part:

> " . . . Nor shall any state derive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to have speedy and public trial, by impartial jury of the state and district wherein the crim shall have been committed. . . ; and to have the assistance of counsel for his defense.

The Fifth Amendment to the Constitution of the United States which provides, in relevant part:

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" . . .Nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . "

This case also involves provisions of the Oklahoma Statutes.

1. O.S. 21 §701.7 Murder in the first degree.

   A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of anothe human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

   B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, excape from lawful custody, first degree burglary or first degree arson.

2. O.S. 21 §701.9 Punishment for murder.

   A. A person who is convicted of or pleads quilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life.

STATEMENT OF THE CASE

The petitioner, Roger Dale Stafford, was convicted of three counts of murder in the first degree. 21 O.S. 701.7 He was sentenced to death for each murder.

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QUESTIONS PRESENTED

1. Can an appellate court determine whether Roger Dale Stafford, Sr. petitioner herein, was denied his Constitutional right to effective assistance of counsel, in an advisary system on a record replete with eneptness or must it require an evidencary hearing or reverse for a new trial?

2. Was Roger Dale Staffoed, Sr.'s right to remain silent, guaranteed to him by the Fifth Amendment, denied when he was forced at trial to testify and refute priviledged spousal communications?

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STAFFORD STATEMENT OF FACTS

The Petitioner, Roger Dale Stafford, Sr., was charged by information in the District Court of McClain County with three counts of murder, involving the death of Melvin Lorenz, his wife and son, which occurred during a road side robbery on the 22nd day of June, 1978, in McClain County, Oklahoma. (Pleading No. 44) Roger was arrested by police officers in Chicago, some ten months later and returned to Oklahoma City for interrogation of not only the homicides in McClain County, but also homicides involving the death of six people at the Sirloin Stockade in Oklahoma City. (Tr. 998-1014)

His wife, Verna Stafford, was apprehended in Chicago on March 7, 1979, and interrogated by an Oklahoma City Police Detective and also by agents of the Oklahoma State Bureau of Investigation. Initially Verna denied any involvement by Roger in any of the murders, however, she later implicated Roger, and as a result, primarily, of her testimony, he was charged in Oklahoma County with the six counts of murder and later convicted.

After the conviction in Oklahoma County, he was tried in McClain County and convicted of the Lorenz killings. In both cases he was represented by J. Malone Brewer, an Oklahoma City Lawyer, who was appointed to represent him in the McClain County Cases.

The evidence offered by the State of Oklahoma showed that Roger, Verna and their children had arrived in Oklahoma shortly before the 22nd of June, 1978, and initially stayed in Oklahoma City but later went on to Tulsa. (P.H. Tr. pg 74-76) Verna testified that on or about the 19th day of June, 1978, they traveled from Tulsa, Oklahoma to Purcell, Oklahoma, burglarized a pawn shop and took a revolver which was later determined to be the murder weapon in the Lorenz family killings.

Verna Stafford, who was the State's chief witness, testified over the objection of her husband at the preliminary hearing and subsequent trial as to her and Roger's involvement in the Lorenz family killings. She testified that on the 21st day of June, 1978, Roger, Verna and Harold, Roger's brother, left Tulsa in the evening and drove to Oklahoma City and

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subsequently wound up in Pauls Valley, a town approximately 22 miles South of Purcell, and cased motels for the purpose of robbing them. However, they determined that there was not sufficient money to warrant a robbery and proceeded North along Interstate 35. They drove over to the side of the road and after extended discussion decided to stop a vehicle and rob the occupants. The plan was to raise the hood on the Stafford car as a disabled vehicle and for Verna to stand next to the highway and flag down a motorist while Roger and Harold hid on the side of the car away from the highway, and to rob any motorist who stopped for them. Verna testified that Roger killed Mr. Lorenz, and his wife and then shot their son who was in the camper on the back of the Ford pickup. She testified that they dragged the bodies of Mr. and Mrs. Lorenz into the ditch and after delaying a short while for traffic on the highway they drove approximately three-quarters of a mile North and disposed of the body of the boy from the back of the camper. (Tr. 366-374)

They planned to leave the pickup at the Sheraton Hotel in Oklahoma City, which is located close to Will Roger's Airport. However, they later decided to take a drive and wound up at Stillwater, Oklahoma, a town approximately 80 miles North and East of Oklahoma City. Verna testified that they left Stillwater about dawn and returned to Oklahoma City, whereupon it was decided that Roger would drive back to Tulsa and that she and Harold would hitchhike. (Tr. 375-385)

One of the State's witnesses, Ray Taggett, testified that at approximately 7:00 a.m. on the morning of the 22nd day of June, 1978, (Tr. 1088-1092) he saw a pickup matching the description of the Lorenz' at a Qwik Stop in Stillwater, with two males in it. He further testified that he saw the pickup later at a Sambo's restraunt in Stillwater and saw three people, two of whom he identified as Roger and Verna. This was between 8:00 and 8:30 a.m. (Tr. 1098-1099)

He stated that he had a friend with the Stillwater Sheriff's Office to whom he gave information relating to the pickup that he had observed on the 22nd day of June, 1978. (Tr. 1102) A few days later he assisted an O.S.B.I. agent in doing composites. (Tr. 1104) He later picked Roger out of a photo line up after he had been hypnotized. Other witnesses were called on behalf of the State.

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Roger took the witness stand in his own defense to deny any part in the crimes, and testified that Verna had threatened to get him, observing that "Oh God, there I am, vindictive woman is going to get me." (Tr. 1254)

Mr. Brewer called alibi witnesses who placed Roger Stafford in Tulsa, either at work or at the emergency housing center where he was residing on June 22, 1978, the day in question, aproximately 150 miles from the scene of the Lorenz family killings.

After the close of the evidence, the court instructed the jury, arguments were held and the jury retired only to return one hour and thirty-eight minutes later with a verdict of guilty. (Tr. 1596-1598) At the second stage of the proceedings, which is used to determine the mode of punishment, the state merely incorporated all evidence of the trial stage and rested. Mr. Brewer also merely incorporated the foregoing trial record, and rested his case without presenting any additional evidence in an effort to mitigate a possible death sentence. He stated to the court that he must rest or there was error. The jury then deliberated the punishment and came back with a verdict of death in one hour and fourteen minutes (Tr. 1621-1622).

J. Malone Brewer who had represented Roger Stafford in the Sirloin Stockade Trial in Oklahoma City, represented him in McClain County for the Lorenz case for which he received a Court Appointment fee. During the pre-trial stage, Mr. Brewer filed various motions to suppress, and objected to the competency of Verna Stafford as a witness, since she was the wife of Roger Stafford. Brewer's Motions were overruled by the trial judge. Mr. Brewer filed a motion for a change of venue, but failed to follow the method prescribed by the Statutes of the State of Oklahoma.

Mr. Brewer then filed a Motion for New Trial on behalf of Roger which was presented, but not argued to the court, and was overruled. At the same time he asked the court to pay him the court appointed fee based upon the time of [illegible] hours involved in the case of State of Oklahoma -vs- Roger Dale Stafford, Sr.

The Court of Criminal Appeals affirmed the decision and from this ruling Roger Stafford brings this Writ.

REASONS FOR GRANTING THE WRIT

I

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER AN EVIDENTIARY HEARING IS REQUIRED AS A MATTER OF LAW UNDER THE SIXTH AND FOURTEENTH AMENDMENT TO MAKE A DETERMINATION ON EFFECTIVENESS OF COUNSEL WHERE SUFFICIENT ALLEGATIONS DEMONSTRATE INEFFECTIVENESS.

A R G U E M E N T

As has previously been set forth, Roger Stafford asserts that he was denied effective counsel which violated his Constitutional Rights under the Sixth and Fourteenth Amendment of the United States Constitution. His counsel at the trial was one J. Malone Brewer, an Oklahoma City Lawyer, who had represented him at a trial in Oklahoma City. On the 2nd day of February, 1980, at a hearing before the McClain County District Court, Mr. Brewer asked to be appointed as counsel for Roger.

After the preliminary hearing before the committing magistrate, Roger was bound over for trial in the District Court of McClain County on a felony information alleging three counts of murder. The original preliminary information filed by the State of Oklahoma was amended with a bill of particulars which set forth four aggravating factors in the bare language of the statutes, totally lacking facts to connect the circumstances of the case to the statutory aggravating factors. When the information was filed after the preliminary hearing, the bill of particulars was not also filed. However, at the sentencing stage of the trial, the Court instructed on the aggravating factors again in the bare language of the statutes, to which no objection was made by trial counsel. Petitioner contends said failure to provide basic facts constitutes fundamental error. A concurring opinion in Godfrey v. Georgia 446 U.S. 438, 100 S.Ct. 1759, 64 L.Ed. 398 (1980), 769 agrees:

> ". . . even under the prevailing view that the death penalty may . . . constitutionally be imposed, it is not enough for a reviewing court to apply a narrowing construction. The jury must be instructed on the proper, narrow construction of the statute. . . . it is the sentencer's discretion that must be channeled and guided. . . . To give the jury an instruction in the form of the bare words of the statute, words that are hopelessly ambiguous and could be understood to apply to any murder . . . would effectively grant it unbridled discretion to impose the death penalty. . . . it is impossible for it [the reviewing court] to say whether a particular jury would have so exercised its discretion if it had known the law."

The jury in the present case found the killings to be ". . . especially heinous, atrocious, and cruel," 21 O.S. §701.12 (4), despite the fact that the evidence presented indicated that the victims were shot and expired in a short period of time. No evidence was presented to indicate that they were tortured prior to being shot.

Georgia's Statute, Ga. Code §27-2534.1 (b)7 (1978), provides that a murder is aggravated if it is "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Such aggravation allows a jury to impose the death penalty. Godfrey, however, precludes the finding of an aggravating factor absent the consciousness of a mind materially more depraved than any other murderer, or torture. The similarity of the two above cited statutes would indicate they should both receive the same construction by a reviewing court. The Oklahoma Statute, it should be noted, could be construed somewhat more narrowly than the Georgia Statute, in that Oklahoma employs the conjunctive term, and, apparently requiring all three factors, whereas Georgia uses the term, or, requiring only one factor of the group to be present.

The Oklahoma Court of Criminal Appeals, however, determined the murders in the present case to have been aggravated by being especially heinous, atrocious, and cruel because they were unprovoked and committed upon a family rendering assistance while on its way to a funeral. Stafford v. State, 669 P.2d 285 (Okl. Cr.1983) 299. This constitutes an incorrect construction of the terms, heinous, atrocious, and cruel, absent the evidence of torture or depraved consciousness required in Godfrey.

Three other aggravating factors were submitted to the Stafford jury and all four were found to be present in two of the three murders. Without adequate guidelines or facts to supplement the aggravating factors, the presence of the heinous, atrocious and cruel instruction, listed together with the other three factors, erroneously given in bare statutory language, would have impermissibly colored the deliberations of the jury. The prejudicial effect of the errors, supra, could have been neutralized by Mr. Brewer, either by motion to quash and demurrer.

This presents another of Roger's contentions--that he was denied the assistance of effective counsel. Capable assistance is very important in a case involving substantial pre-trial publicity. Such publicity is particularly likely to prejudice a defendant's position in a rural community, when the case receives state wide attention as happened in the case at bar. McClain County, the situs of the

crime and trial, is approximately 35 miles south of Oklahoma County. The coverage of the Lorenz family killings created an unusually strong anxiousness in the McClain County community to fix responsibility for the crime upon a likely pound of flesh. Many residents of McClain County work in Oklahoma City and were particularly susceptible to opinionated speculation in the news media as to who had committed the crimes. Mr. Brewer attempted to file a motion for change of venue, but it was overruled for failure to follow the statutory requirements. The statutes of the State of Oklahoma, namely 22 O.S. (1981) §561, provides that for a change of venue the application of the Defendant must be verified by affidavit and supported by affidavits of at least three credible persons who reside in the county. It is inconceivable, when judging from the minimum level of competence required of an attorney in a capital case, that trial counsel not only failed to properly move for a change of venue, but that he also did not submit any affidavits from residents of McClain County.

Further ineptness on the part of trial counsel is indicated by his failure to request any instructions of the trial court. (Trial Transcript Page 1539) The instructions, (Trial Transcripts 1541-1558) reveal there were none given dealing with pre-trial publicity. However, Roger would point out to the Court that there were questions on voir dire dealing with pre-trial publicity. He does not concede that the voir dire was sufficient on this issue nor was a voir dire in conformance with Witherspoon -vs- Illinois 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed.2d 776 (1968)

This case involved three count first degree murder information and yet counsel failed to provide any requested instructions. Mr. Brewer also did not present any verdict forms to the trial judge, and during the sentencing phase the trial judge was allowed to instruct on the following mitigating circumstances:

> "The following are the minimum mitigating circumstances as provided by law:
>
> 'Number one: The Defendant has no significant history of prior criminal activities; . . .
>
> 'Seven: At the time of the murder, the capacity of the Defendant to appreciate the criminality wrongfulness of his conduct or to conform his counduct to the requirements of law was impaired as a result of mental disease or intoxication; The age of the Defendant at the time of the crime.' "
> (Tr. 1606-1607)

No objection to the mitigating circumstances instruction was made despite the fact that Eddings v. Oklahoma 455 U.S. 104,102 S.Ct. 869, 872, 71 L.Ed.2d 1 (1982) states,

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"the Statute [21 O.S. § 701.12] nowhere defines what is meant by 'any mitigating circumstances.' "(Emphasis added)

The Jury went out to deliberate Roger's fate at 11:44 a.m. and returned with its verdict of guilty at 1:22 p.m., a period of only one hour and thirty-eight minutes. The trial judge then began the second stage or punishment stage of the trial during which Mr. Brewer was totally disoriented and ineffective. He, the Judge, and the Prosecutor made the following comments, at page 1612 of the Trial Transcript:

> "Mr. Brewer: If the Court please, Your Honor, may we approach the bench?
>
> The Court: Yes, sir.
>
> (The following proceedings were had at the bench out of the hearing of the jury and the Defendant:)
>
> Mr. Brewer: The State's rested. I better rest, or we've got error.
>
> The Court: Do what?
>
> Mr. Brewer: I've got to rest. I have got to do mine before we have closing arguments, or we have blown it.
>
> Mrs. Huff: If he wants to present evidence—
>
> Mr. Brewer: I have at least got to rest. She's going into closing arguments at this point.
>
> The Court: All right. Now, you are not going to present any evidence?
>
> Mrs. Huff: No.
>
> Mr. Brewer: She's rested.
>
> Mrs. Huff: Just arguments.
>
> The Court: Have you rested?
>
> (The following proceedings were had in open Court within the hearing of the jury and the Defendant:)
>
> Mr. Brewer: Comes now the defendant and moves the court to incorporate within the aspects of phase two all of the evidence and exhibits presented in phase one. Move it become incorporated and a part of this proceeding as well, at which time Defense rests.
>
> The Court: As to evidence?

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Mr. Brewer: Yes, sir.

Mrs. Huff: If it please the Court?

The Court: You may proceed."

Roger submits that trial counsel failed to adequately represent him during the trial, particularly during sentencing. The counsel's performance certainly fell short of the zealous representation required by D.R. 7-101 of the Oklahoma Lawyer's Code of Professional Responsibility, and therefore he was prejudiced by the acts of Mr. Brewer.

The Oklahoma Statutes, 22 O.S. (1981) §745, provide that burden proof of mitigation in the punishment in a murder case is upon the defendant. While not conceding that this statute is constitutional, the petitioner would point out that in the above trial exerpt the only evidence that was presented by Roger's Trial Counsel was the evidence incorporated from the first stage of the proceeding--the same evidence which resulted in Roger's conviction. Thus it could hardly be concluded that Mr. Brewer was making a sugnificant effort to meet his statutory burden of proving mitigating circumstances—and even less likely that he was making a zealous effort to do so.

Imporatant questions are raised in the transcript of the hearing held on March 17, 1980, wherein the question of compensation for Mr. Brewer was presented to the trial judge. Stafford v. State 669 P2d 285 (Okl.Cr. 1983) 300 It had come to the court's attention that rumors had surfaced that Mr. Brewer had a proprietary interest in the publication rights to the trial. A reading of this does not show any denial on Mr. Brewer's part that he had acquired some type of publication rights, etc... to the incidents involved in the Lorenz family case or of the Sirloin Stockade Case. The Sixth Amendment requires an Attorney to devote his time and attention solely to the interests of his client. Glasser v. United States 315 U.S. 60, 62 S. Ct. 457, 86 Arrow. Ed. 680 (1942). "Any conflicts of interest are to be avoided."

Roger Stafford would point out to this Court that contracts involving publication rights to a trial, during the trial, are expressly prohibited by D.R. 5-104

> (A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

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(B) Prior to conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client or a prospective client by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment.

Petitioner seriously questions the amount and quality of trial counsel's preparation. D.R. 6-101 of the Oklahoma Code provides as follows: "(A) A Lawyer shall not . . . (2). Handle a Legal matter without preparation adequate in the circumstances." . . . In all fairness to trial counsel, one would have to assume that he did do some work and preparation since the alibi witnesses were presented, but the record reflects that he showed no time whatsoever for preparation. (See "Exhibit " Attached) As to the issue of the quality of representation, this Honorable Court, in Cuyler v. Sullivan 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), on page 716, stated that the assistance at trial must be adequate. "The right to counsel prevents the State from conducting trials in which persons who face incarceration must defend themselves without adequate legal assistance." The right to adequate assistance should especially be preserved in a capital case.

In a well reasoned decision, dealing with a guilty plea, Justice Bazelon, Chief Judge of the United States Circuit Court of Appeals for the District of Columbia, writing in the United States v. D.E. Coster 487 Fed 2d 1197, Ct of A. D.C. (1979) at page 1202 states as follows: ". . . in guilty plea context the court has held that the accused's right to effective assistance is the right to 'reasonable, competent' representation . . ." McMann v. Richardson 397 U.S. 759, 770-771, 90 S Ct. 1441, 25 L.Ed.2nd 763 (1970) apparently adequate legal assistance and effective assistance at counsel are one and the same. But this leaves unanswered the question as to what is effective assistance and how this relative effectiveness is to be determined. Roger would submit to this Court that the procedure needed to determine this is a hearing to be conducted pursuant to requirements of Cuyler v. Sullivan, supra. If a review of the record before this Honorable Court substantiates his claim of ineffective counsel, then he believes that the whole matter should be reversed for a new trial.

Mr. Brewer filed a Motion for New Trial, but a review of the appellee's brief only lends credence to the fact that it was sloppy, unprofessional and boarders on the area of being a farce and a mockery.

Finally, according to trial counsel's own pleading filed with the District Court of McClain County, and his request for court appointed fees, he spent a total

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of 142 hours on the case. ("Exhibit D") Such a short period of time left him confused and led to errors such as the one at page 1612 of the trial transcript. Mr. Brewer therein stated as follows: "I've got to rest. I have got to do mine before we have closing arguments, or we have blown it." (Emphasis added) One wonders whether Mr. Brewer was acting as an effective advocate in an adversary proceeding for his client or whether he was acting for a disallowed proprietary interest, discussed supra.

It is interesting to note, and Petitioner is well aware, by the holding in Cuyler v. Sullivan, that retained and court appointed counsel are held to the same standards for trial conduct. However, in this particular instance, Mr. Brewer, as court appointed counsel, was paid by the State of Oklahoma, who in fact was prosecuting his client. And the judge of the case was paid by the State of Oklahoma. Does this in and of itself create problems? One can only wonder to whom Mr. Brewer was referring when he used the term we in the quote, supra.

Dealing further with the lack of adequate counsel, it is noted at page (Tr. 1616-1618) of the Transcript, that trial counsel's only evidence offered at the sentencing stage was that which was incorporated from the trial stage. The Oklahoma Statute, namely 22 O.S. (1981) § 745, provides for mitigation of punishment in a capital case. While the trial court instructed on mitigating circumstances (trial transcript page 1612) counsel for Roger offered no evidence specifically designed to mitigate, whatsoever, and thus failed to meet the requirements of Eddings v. Oklahoma, 102 S.Ct. 869 (1982) which states at page 875:

> . . . Thus, the rule in Lockett followed from the earlier decisions of Court and from the Court's insistence that capital punishment be fairly imposed, and with reasonable consistence or not at all. By requiring that the sentencer be permitted to focus ' "on the circumstances of the person who committed the crime' " . . . that there be taken into account the circumstances of the offense with the character and propensities of the offender.

How could the rule just stated be followed, when during the sentencing phase counsel for the Petitioner offered no additional evidence, whatsoever, to mitigate or to show the character and propensities of the offender. This begs the question as to how the sentencing jury is to mete out a punishment tailored to the individual circumstances as is required in a capital case. Zant v. Stephens 103 S.Ct. 2733 2744, 77 L.Ed.2d 235 (1983).

The State of Oklahoma has specifically provided for a separate sentencing stage in a capital case. Logically it can hardly be found to comport with legislative

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intent if, in the separate hearing designated for the determination of aggravating and mitigating circumstances, both counselor for the state and counselor for the defense summarily incorporate the first phase of trial into the second phase and proceed to sentencing with the mere addition of three pages of arguments each. Lockett and Eddings stress the need for a tailoring of punishment to fit the crime based upon the individual characteristics of the case. A rubber stamping process such as happened in this case results in a sham during the sentencing procedure and thwarts the safeguards of both the procedural system designed by the Oklahoma Legislature and the Court's standards provided in Lockett and Eddings.

Eddings page 875, construes the Lockett rule to be that the sentencer in capital cases must be permitted to consider any relevant mitigating factor . . . to avoid a false consistency in sentencing. Edding further holds that ". . . neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." (Emphasis the Court's) Id. at 876. This language lends further support to the petitioner's position that the sentencing stage of a trial in Oklahoma requires a full investigation in the mitigating factors of the case. It forbids, as a matter of law, a rubber stamping of guilt - determining evidence as the only relevant mitigation factors and therefore petitioner also prays that the second phase of his trial not be allowed to remain as is, and with all faults, as this is the very phase which determines whether a human being lives or is sentenced to death.

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II

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE IF PETITIONER'S RIGHTS TO REMAIN SILENT WAS DENIED.

ARGUEMENT

The trial judge allowed Verna Stafford, wife of Roger, to testify over his objection . The basis on which this was allowed was in most part because she testified that Roger's brother, Harold Stafford, was present and therefore the communication dealing with communications between husband and wife was not privileged under either 21 O.S. (1981) §702 or 12 O.S. (1981) §2404.

The falsity of this is that Roger could not impeach her testimony by calling Harold as he had died prior to trial from a motorcycle accident. Even if he were alive he could not call him as a witness because of this court's ruling in Burton v. U.S. 391 U.S. 126, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968) dealing with confession of co-defendants. Neither could Roger call Harold to testify because he could refuse to based upon his rights of the Fifth Amendments. Allowing Verna Stafford to testify put Roger in an unenviable position of taking the witness stand in his own defense. This violated his Constitutional rights guaranteed under the Fifth Amendment.

In Estelle v. Smith 451 U.S. 454, 68 L.Ed.2d 359, 101 S.Ct. 1866, 1873 (1981) the Court states:

> "The Fifth Amendment privilege is as broad as the mischief against which it seeks to guard; Counselman v. Hitchcock, 142 U.S. 547, 562, 12 S.Ct. 195, 198, 35 L.Ed. 1110 (1892) and the privilege is fulfilled only when a criminal defendant is guaranteed the right 'to remain silent unless he choose to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence' " . . .

In light of Estelle v. Smith, supra, Roger could not remain silent, but had to take the witness stand to refute his vindictive wife's testimony. He was boxed in. In Application of Gault 387 U.S. 1, 18 L.Ed.2d 527, 87 S.Ct. 1428, 1454 (1967) dealing with the rights afforded by the Fifth Amendment which are applied to the States by the Fourteenth Amendment, it states:

> " . . . One of the purposes is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction."

Roger was denied the right to remain silent because when his wife testified he was

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forced to take the witness stand and refute her. This is not consistant with the requirement that any waiver of said right be voluntary as stated in United States v. Washington 431 U.S. 181, 97 S.Ct. 1814, 52 L. Ed.2d 238 (1977) and Miranda v. Arizona 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

The Petitioner is aware of this court's holding in Trammel v. United States 445 U.S. 40, 63 L.Ed.2d 186, 100 S.Ct. 906 (1980) but he would ask the court to review its ruling in light of his argument dealing with his Fifth Amendment argument. At page 913 of the Supreme Court Reporter it states as follows:

> " . . . It hardly seems conducive to the preservation of the marital relationship to place a wife in jeopardy solely by virtue of her husband's control over her testimony".

At page 912 the Court poses the proposition:

> "Here we must decide hether the privilege against adverse spousal testimony promotes sufficiently important interests to outweigh the need for probative evidence in the administration of Criminal justice."

In Trammel the Court talks about placing the wife in jeopardy. But what about Roger in the present case? Is he not placed in the same jeopardy by being forced to testify in court, subjecting himself to skillfull and manipulative cross-examination, and psychological domination.

In Harrision v. United States, 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968) a case where illegally obtained confessions were obtained and the Defendant took the stand, this Court at page 2010 of the Supreme Court Reporter said:

> " . . . The question is not whether the petitioner made a knowing decision to testify, but why. If he did so in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissable . . . "

The reason why Roger had to take the witness stand was to refute and deny supposed conversations with his wife. He could not remain silent. The testimony of Mrs. Stafford was tainted, therefore the interest of Roger, the right to remain silent was denied him. This interest as graranteed by Fifth Amendment should take presidence over allowing spousal communication as supposed probative evidence.

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CONCLUSION

Effective assistance of counsel, right to remain silent, and equal protection of the law are all rights guaranteed Roger Dale Stafford, Sr. when he was on trial for murder in McClain County. These rights guaranteed him by our founding fathers when writing the Constitution and subsequently safeguard by this Court were denied him. He would respectfully and humbly ask this Court to grant his Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Charles B. Grethen, certify that I mailed a copy of this Petition for Certiorari and all accompanying documents to Michael C. Turpen, Attorney General, State of Oklahoma, Suite 112, State Capitol, Oklahoma City, Oklahoma 73105 this 4th day of January, 1984.

Charles B. Grethen

IN THE SUPREME COURT OF THE UNITED STATES

ROGER DALE STAFFORD, Petitioner,	)	
-vs-	)	Case No. A-418
THE STATE OF OKLAHOMA, Respondent.	)	

VERIFIED AFFIDAVIT

Charles B. Grethen, having been first duly sworn upon his oath states that on the 4th day of January, 1984, he deposited in the U.S. Mail at its Post Office in Purcell, Oklahoma 73080. The original and one copy of a petition for a Writ of Certiorari in the above address to the Office of the Clerk, Supreme Court of the United States, Washington, D.C. 20543, with sufficient postage.

Charles B. Grethen

Subscribed and sworn to before me this 4th day of January, 1984.

Notary Public

My Commission Expires:
1-22-84

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contends that the evidence conflicted as to the cause of death. It is well-settled that the "[s]ufficiency of the evidence is a jury question, and this Court has often held that when there is some evidence to present to a jury, we will not interfere." *Woodard v. State*, 567 P.2d 512 (Okl.Cr.1977). We also note that the evidence should be viewed in the light most favorable to the State. *Renfro v. State*, 607 P.2d 703 (Okl.Cr.1980). Furthermore,

> The credibility of witnesses and the weight and consideration to be given to their testimony are within the exclusive province of the trier of facts and the trier of facts may believe the evidence of a single witness on a question and disbelieve several others testifying to the contrary. *Caudill v. State*, 532 P.2d 63 (Okl.Cr.1975).

[7] Mr. Cecil Kent, a six-time convicted felon, testified for the State that, although he was intoxicated to the point of passing in and out of consciousness, he saw the defendant hit and kick the victim in the head. It was up to the jury to assess Mr. Kent's credibility and to determine the weight to be given to his testimony. This Court will not invade the province of the jurors, who have the opportunity to gauge the witness's demeanor at trial. See, *Caudill*, supra, at 66.

[8] The defendant also complains that twenty (20) years' imprisonment for his conviction of First Degree Manslaughter is excessive.

> The question of excessiveness of punishment must be determined by a study of all the facts and circumstances in each case, and this Court does not have the power to modify a sentence unless we can conscientiously say that under all facts and circumstances, the sentence is so excessive as to shock the conscience of the Court. *Baldwin v. State*, 596 P.2d 1269 (Okl.Cr.1979), and cases cited therein.

The jury could reasonably have concluded that the defendant over-retaliated for the physical advance on his girlfriend made by the intoxicated victim. Therefore, we cannot find that the punishment imposed shocks the conscience of this Court.

The judgment and sentence is accordingly AFFIRMED.

CORNISH, J., concurs.

BRETT, J., concurs in results.

Roger Dale STAFFORD, Sr., Appellant,

v.

The STATE of Oklahoma, Appellee.

No. F-80-256.

Court of Criminal Appeals of Oklahoma.

Sept. 7, 1983.

Rehearing Denied Oct. 6, 1983.

Defendant was convicted in the District Court, McClain County, J. Kenneth Love, Associate Judge, of three counts of murder in the first degree, and he appealed. The Court of Criminal Appeals, Bussey, P.J., held that: (1) motion for change of venue was not properly before the trial court; (2) individual voir dire was not required; (3) prospective juror who had predetermined she would vote against imposition of death penalty regardless of the evidence presented in support of it was properly excused; (4) testimony concerning conversations between defendant and his wife were properly admitted; (5) testimony concerning conversations in which statements were made by coconspirator who had since died was admissible; (6) identification of defendant in a photographic lineup by two witnesses following hypnosis did not result in error or prejudice meriting reversal or modification; (7) photographs of victims' bodies were properly admitted; (8) trial counsel's representation of defendant was adequate; (9) evidence was insufficient to

APPENDIX A

establish conflict of interests on part of trial counsel; (10) defendant was afforded all protection and opportunity created by statute providing for separate sentencing stage upon conviction or adjudication of guilt of murder in the first degree; and (11) death sentences were properly imposed.

Affirmed.

1. Criminal Law ⇐134(2)

Motion for change of venue was not properly before trial court where motion was not verified by affidavit and was not supported by requisite affidavits of at least three credible persons residing within the county. 22 O.S.1981, § 561.

2. Jury ⇐99(1)

Defendant was not entitled to be tried before a jury completely ignorant of the facts and circumstances surrounding the case. 22 O.S.1981, § 561.

3. Criminal Law ⇐137, 1150

Decision whether to grant a change of venue rests within the discretion of the trial court, not to be disturbed absent an abuse of that discretion. 22 O.S.1981, § 561.

4. Criminal Law ⇐126(1)

Trial court did not abuse its discretion in not granting change of venue where trial court questioned each venireman to expose potential bias, counsel was afforded wide latitude in examination of the jury panel, and those ultimately selected to sit as the jury said they were able to ignore any information concerning defendant they had garnered from media sources and could render a verdict based on the evidence presented. 22 O.S.1981, § 561.

5. Jury ⇐131(13)

Trial court did not abuse its discretion in refusing individual voir dire of veniremen where counsel for defendant was given great latitude to ferret out potential juror bias.

6. Jury ⇐108

Prospective juror who had predetermined she would vote against imposition of the death penalty regardless of the evidence presented in support of it was properly excused.

7. Witnesses ⇐185

Testimony of conversation between defendant and his wife was not barred by statute governing privileged husband-wife communications which was repealed before the conversations were had. 12 O.S.1981, § 3102.

8. Witnesses ⇐188(1)

Testimony concerning conversations between defendant and his wife were not barred by statute relating to privilege against disclosure. 12 O.S.1981, § 3102.

9. Witnesses ⇐188(1)

Evidence concerning conversations defendant had with his wife were not admissible under statute governing marital communications privilege in criminal cases.

10. Witnesses ⇐193

Testimony of defendant's wife concerning conversations between her and defendant did not fall under statutory definition "confidential communications," where all of the conversations occurred in the presence of a third person. 12 O.S.1981, §§ 2504, 2504, subds. A, B.

See publication Words and Phrases for other judicial constructions and definitions.

11. Witnesses ⇐192

No martial privilege issue was involved with most of testimony of wife of defendant concerning conversations between her and defendant in that the bulk of the testimony concerned overt acts committed by the defendant, a third person and herself, and the acts did not constitute confidential communications. 12 O.S.1981, §§ 2504, 2504, subds. A, B.

12. Witnesses ⇐222

Trial court properly permitted wife of defendant to testify that third person was present during certain conversations between her and defendant, and in allowing her to testify as to the substance of those conversations. 12 O.S.1981, §§ 2504, 2504, subds. A, B.

13. Witnesses ⇐192

Argument between defendant and his wife in a hotel parking lot at midnight which became so loud that it attracted the attention of a person who was staying in the hotel was not a "confidential communication," in that the defendant was conducting himself in a loud manner in a place where he could have no reasonable expectation of privacy. 12 O.S.1981, §§ 2504, 2504, subds. A, B.

14. Criminal Law ⇐423(1)

Testimony concerning statements made by coconspirator who died before trial was admissible under statute providing that a statement is not hearsay if the statement is offered against a party and is a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. 12 O.S.1981, § 2801, subd. 4, par. b(5).

15. Criminal Law ⇐1169.2(2)

Identification of defendant in a photographic lineup by two witnesses who had been hypnotized before viewing the lineup did not result in error or prejudice to defendant meriting reversal or modification, in that the two witnesses had much independent information.

16. Criminal Law ⇐438(1)

Photographs are admissible in criminal trial so long as they are relevant and their probative value to the jury outweighs their prejudicial impact, and it is within the discretion of the trial court to determine the admissibility of photographs, based on such standards. 12 O.S.1981, §§ 2401, 2403.

17. Criminal Law ⇐1153(1)

The Court of Criminal Appeals will not disturb trial court's decision concerning admissibility of photographs absent abuse of discretion. 12 O.S.1981, §§ 2401, 2403.

18. Criminal Law ⇐438(6, 7)

In first-degree murder prosecution, photographs of victims' bodies as they lay in the fields where they were found, offered to demonstrate where and how the bodies were disposed of following the murders, and photographs of the bodies taken after they were cleaned up, offered to demonstrate the points of entry and nature of the gunshot wounds which caused their death, were relevant to the issues at trial, were probative of the crime committed, and were not unduly prejudicial. 12 O.S.1981, §§ 2401, 2403.

19. Homicide ⇐338(4), 341

In first-degree murder prosecution, evidence that defendant was a bigamist, to which an objection was sustained, played no prejudicial role in defendant's judgment and sentences, and such evidence and trial court's failure to instruct jury constituted harmless error.

20. Criminal Law ⇐369.3

In first-degree murder prosecution, fact that weapons identified by witnesses as having been seen by them in circumstances related to the offenses charged had been used in previous murders for which defendant was convicted and had been introduced into evidence against defendant in that trial did not constitute evidence of other crimes.

21. Criminal Law ⇐641.13(1)

Standard by which trial counsel's performance would be judged for purpose of determining whether he rendered ineffective assistance of counsel was "farce or mockery of justice" test which existed at time of defendant's trial.

22. Criminal Law ⇐641.13(1)

Burden of establishing ineffective assistance at trial is upon defendant, and is a heavy burden.

23. Criminal Law ⇐641.13(2)

Defendant's burden of proving he was not adequately represented at trial was not sustained by demonstrating possible error in trial counsel's judgment.

24. Criminal Law ⇐641.13(2)

Fact that trial counsel failed to properly move for a change of venue, failed to move to suppress testimony of various witnesses, and failed to draft a comprehensive motion for new trial was of no consequence to question of ineffective assistance at trial, as Court of Criminal Appeals considered all allegations on their merits, and concluded

that all the testimony was properly admitted.

25. Criminal Law ⇐641.13(7)

Failure of defendant's counsel to object to sentencing instructions before they were given did not constitute ineffective assistance of counsel, in that the instructions were proper and thus, it would have merited defendant nothing had a timely objection been made.

26. Criminal Law ⇐641.13(7)

Failure of defendant's trial counsel to present any evidence in mitigation of death sentence at sentencing stage of trial did not constitute ineffective assistance of counsel, in that defendant's counsel incorporated evidence presented at first stage of trial as evidence in the second stage, and defendant failed to demonstrate that any mitigating evidence other than that adduced in the first stage was available.

27. Homicide ⇐327

Assertion on appeal that defendant had a brain tumor at the age of 12, implying that such a condition may have resulted in psychiatric problems, offered as evidence in mitigation of death sentence, would not be accepted absent production of evidence to substantiate the claim.

28. Criminal Law ⇐641.13(7)

Brevity of defense counsel's argument in sentencing stage did not render it ineffective assistance of counsel, where the length of the argument paralleled that of the prosecution, and the substance of the argument contained philosophical and factual arguments concerning the appropriateness of the death penalty in this case.

29. Criminal Law ⇐641.5

To afford relief to defendant on grounds of ineffective assistance of counsel due to counsel's conflict of interests, it must be established that an actual, not a possible, conflict of interest existed, and that the actual conflict of interest adversely affected the attorney's performance. Code of Prof.Resp., DR5–104(B), 5 O.S.A. Ch. 1, App. 3; U.S.C.A. Const.Amend. 6.

30. Criminal Law ⇐641.5

Affidavit of defendant's appellate counsel that defendant's trial counsel exchanged his services for publication rights to defendant's life story, standing alone, was not sufficient to establish an actual conflict of interest on part of the trial counsel. Code of Prof.Resp., DR5–104(B), 5 O.S.A. Ch. 1, App. 3; U.S.C.A. Const. Amend. 6.

31. Criminal Law ⇐641.5

Even assuming, arguendo, that defendant's trial counsel had obtained an interest in the publication rights to defendant's life story and that it created a conflict of interest, evidence was insufficient to show that trial counsel's representation was adversely affected thereby. Code of Prof.Resp., DR5–104(B), 5 O.S.A. Ch. 1, App. 3; U.S. C.A. Const.Amend. 6.

32. Homicide ⇐351

Statute requiring defendant to present evidence in mitigation of death penalty did not unconstitutionally shift burden of proof to defendant, in that jury was properly instructed concerning the aggravating circumstances, the mitigation circumstances, and the burdens of proof associated therewith. 21 O.S.1981, § 701.11.

33. Homicide ⇐354

In capital case, preliminary hearing on aggravating circumstances was not required.

34. Homicide ⇐354

Preliminary hearings on the bill of particulars in capital cases are not required.

35. Homicide ⇐354

Defendant was afforded all protection and opportunity created by statute providing for separate sentencing stage upon conviction or adjudication of guilt of murder in the first degree, and was not prejudiced or denied any substantive or procedural rights by the manner in which the sentencing was conducted; fact that defendant did not call any witnesses on his own behalf or recall any witnesses from the first stage of trial could not be attributed to the procedural

format of the sentencing stage. 21 O.S. 1981, §§ 701.10, 701.12.

36. Homicide ⇐354

Jury did not impose defendant's sentences of death under influence of passion, prejudice or any other arbitrary factor. 21 O.S.1981, § 701.13, subd. C.

37. Homicide ⇐354

In first-degree murder prosecution, evidence was sufficient to support finding of aggravating circumstances that defendant knowingly created a risk of death to more than one person, that the murders were especially heinous, atrocious or cruel, that the murders were committed for the purpose of avoiding or preventing a lawful arrest or prosecution, and that there existed a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. 21 O.S.1981, § 701.13, subd. C.

38. Homicide ⇐354

In first-degree murder prosecution, sentence of death was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. 21 O.S.1981, § 701.13, subd. C.

An appeal from the District Court of McClain County; J. Kenneth Love, Associate District Judge.

Roger Dale Stafford, Sr., appellant, was convicted in the District Court of McClain County, Oklahoma, of three counts of Murder in the First Degree, Case No. CRF–79–83. He was sentenced to death for each count and appeals. AFFIRMED.

Garvin A. Isaacs, Oklahoma City, for appellant.

Jan Eric Cartwright, Atty. Gen., Susan Talbot, Asst. Atty. Gen., Chief, Criminal Div., State of Oklahoma, Oklahoma City, for appellee.

OPINION

BUSSEY, Presiding Judge:

The appellant, Roger Dale Stafford, Sr., stands convicted in this case of three counts of Murder in the First Degree. He was tried before a jury in the District Court of McClain County, Oklahoma, the Honorable Kenneth Love, Associate District Judge, presiding. The appellant's sentence for each murder was fixed at death, and he appeals therefrom.

The appellant, his wife (Verna Stafford) and their three children were transients who arrived in Tulsa, Oklahoma in June of 1978. Shortly thereafter, the appellant met up with his brother, Harold Stafford.

On June 21, the appellant, Verna, and Harold embarked upon a journey with the purpose of finding an Oklahoma City establishment to rob. All of the targeted sites were too busy, so they drove to Pauls Valley to look for motels to rob. Having examined the number of cars in the parking lots of each of the motels they visited, it was determined that it would not be profitable to rob any of the motels.

As they drove back to Oklahoma City, the trio decided to stop their car, raise the hood, and feign distress, in hopes that a wealthy good samaritan would come along. Verna attempted to flag down by-passing cars as the appellant and Harold lay in wait in the darkness beside the car.

After a period of time, a blue Ford Ranger pickup with a white camper shell pulled off the road, and the driver, Sergeant Melvin Lorenz, exited the vehicle to help Verna. Mr. Lorenz looked at the Stafford automobile, and informed Verna that he could detect no mechanical difficulties. At that point, the appellant and Harold approached Sergeant Lorenz and demanded his wallet. The appellant was armed with a pistol. Sergeant Lorenz informed the appellant that he and his family were on their way to his mother's funeral in North Dakota, and that he could give the appellant some money, but not all that he had.

Upon hearing this, the appellant shot the Sergeant two times. Sergeant Lorenz'

wife, Linda Lorenz, heard the gunshots, and ran toward Verna Stafford from the pickup. Verna knocked Linda Lorenz to the ground. The appellant shot her as she fell.

The three then heard dogs barking and a child calling from the back of the camper. The appellant approached the camper, produced a knife, cut a hole in the screen, and fired his pistol into the darkness. The bullets from the pistol forever silenced the voice of eleven-year-old Richard Lorenz.

The appellant and Harold dragged the bodies of Sergeant and Mrs. Lorenz into a field adjacent to the highway where they were stopped. The appellant and Harold drove the Lorenz vehicle approximately three-fourths (¾) of a mile down the highway, and dumped the body of Richard Lorenz in a field at that point. They then drove the pickup to Will Rogers Airport in Oklahoma City. Verna followed them in the Stafford automobile.

Upon arriving at Will Rogers, Verna parked the Stafford automobile and got in the Lorenz' pickup with the appellant and Harold. The trio drove to Stillwater, Oklahoma. They eventually returned to Will Rogers and abandoned the pickup. The appellant drove the Stafford vehicle back to Tulsa, while Harold and Verna hitchiked to Tulsa.

Much additional evidence was adduced at trial concerning eyewitness identification of the appellant, Verna and Harold at various points throughout the evening and night of June 21–22, 1978; of the appellant's employment; and of various other matters which shall be discussed only as they become pertinent to the appellant's allegations of error.

I. PRE–TRIAL

The appellant argues a change of venue should have been granted in this case. In support of his allegation, he points out the fact that there was widespread publicity throughout Oklahoma concerning this case; and, additionally, that he had been convicted of the "Sirloin Stockade murders" shortly prior to his trial for the Lorenz murders.

[1–4] Trial counsel for the appellant failed to follow the proper procedure as set forth in our statutes to apply for a change of venue. See, 22 O.S.1981, § 561. The motion was not verified by affidavit, and was not supported by the requisite affidavits of at least three credible persons residing within the county. Thus, the motion was not properly before the trial court, and is not properly before this Court.[1] *Ake v. State*, 663 P.2d 1 (Okl.Cr.1983).

In a related assignment of error, the appellant argues the trial court should have conducted the voir dire of the veniremen on an individual basis.

We have held numerous times that the decision whether to voir dire the prospective jurors individually is a matter of the

1. Due to the fact that the appellant has been sentenced to death in this case, and that he argues trial counsel rendered ineffective assistance, we have also considered the issue on its merits. We conclude that the motion for change of venue was properly denied.

The mere fact that there was much publicity concerning this crime, the "Sirloin Stockade murders" and the appellant's implication in both does not by itself establish that the appellant could not receive a fair trial in McClain County. *Shapard v. State*, 437 P.2d 565 (Okl.Cr.1967). It is not surprising that all of the veniremen had heard of the appellant. However, the appellant was not entitled to be tried before a jury completely ignorant of the facts and circumstances surrounding the case. The trial court questioned each venireman to expose potential bias, and counsel was afforded wide latitude in examination of the jury panel. The record reflects that those ultimately selected to sit as the jury said they were able to ignore any information concerning the appellant they may have garnered from media sources. It was sufficient that each juror stated he/she could disregard any opinion he/she may have had, and render a verdict based on the evidence presented. *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); *Russell v. State*, 528 P.2d 336 (Okl.Cr.1974).

The decision whether to grant a change of venue rests within the discretion of the trial court, not to be disturbed absent an abuse of that discretion. *Thomsen v. State*, 582 P.2d 829 (Okl.Cr.1978). Since we do not believe the record will support an assertion that the inhabitants of McClain County were so prejudiced against the appellant that a fair and impartial trial was not possible, we find no abuse of discretion.

trial court's discretion. *Morrison v. State*, 619 P.2d 203 (Okl.Cr.1980); *Irvin v. State*, 617 P.2d 588 (Okl.Cr.1980); *Vavra v. State*, 509 P.2d 1379 (Okl.Cr.1973); *Gonzales v. State*, 388 P.2d 312 (Okl.Cr.1964).

[5] Although we agree that in proper cases, conducting individual voir dire may be useful and appropriate; see, *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); we do not believe the trial court committed error by refusing to do so in the present case.

As noted earlier, in addition to the trial court's preliminary questions, counsel for the appellant was given great latitude to ferret out potential juror bias. Indeed, the transcript of the voir dire reflects that those who had preconceived opinions of the appellant's guilt or innocence, or had doubts about their ability to be impartial, or had reservations about the death penalty, freely stated so.[2] The remaining veniremen admitted they had been exposed to media accounts of the "Sirloin Stockade murders" as well as the Lorenz murders. However, counsel questioned each in detail to ensure each could and would dispel those accounts from their minds.

We have no reason to believe the atmosphere of the voir dire prohibited the veniremen from honestly expressing their emotions concerning this case. There was no need for individual voir dire, thus no abuse of discretion.[3]

In his third allegation of error, the appellant argues the court erred in excusing a potential juror under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

[6] The form and substance of the questions posed the venire panel by the trial court were in compliance with those we have approved in *Chaney v. State*, 612 P.2d 269 (Okl.Cr.1980). Additional questions were asked by the judge to ensure he did not commit the error the appellant alleges today. A review of the discourse between the trial court and prospective juror Smith reveals no violation of *Witherspoon*.[4] It is apparent that Ms. Smith had predetermined she would vote against imposition of the death penalty, regardless of the evidence presented in support of it. *Witherspoon*, supra, at note 21. Ms. Smith was properly excused.

II. THE GUILT STAGE

Two of the appellant's allegations of error concern the fact that testimony was admitted at trial concerning conversations had between Verna Stafford and himself. The allegations specifically concern: 1) conversations held in a Tulsa restaurant in the presence of Harold Stafford, to which conversations Verna testified at the appellant's trial; and 2) that of an argument had between Verna and the appellant, which argument was overheard by a third person who testified concerning the content of the argument at the appellant's trial.

The appellant argues that the testimony in both instances concerned privileged husband-wife communications, protected by Laws 1953, p. 52, § 1, codified as 12 O.S. § 385 (now repealed). He argues that, although the statute has subsequently been repealed, it was in force at the time the conversations were held, thus it should have been controlling at trial.

[7, 8] The appellant is mistaken in his belief that section 385 was in force in June of 1978, when the conversations were had. That statute was repealed by Laws 1977, c. 265, § 13, codified as 12 O.S. § 418.4 (now repealed), effective October 1, 1977. Thus,

2. Mrs. Furr (Tr. 16–17, 24–25, 34–35); Mr. Bartley (Tr. 75–77); Mrs. Beck (Tr. 125, 132–137); Mrs. Abney (Tr. 157–159); Mrs. Young (Tr. 160–162); Mrs. Smith (Tr. 194–196); Mrs. Morehead (Tr. 245–249).

3. The appellant has provided us with examples of several states whose legislatures have made special statutory provisions to afford defendants in capital cases the opportunity to individually voir dire veniremen. As stated above, however, we do not believe individual voir dire was necessary in the present case, and are not persuaded by the legislatively enacted criminal procedure of other states.

4. See Appendix A

the appellant's argument fails from the outset. However, even if we apply the appellant's argument to Section 418.4 (which, we note was repealed effective October 1, 1978, by Laws 1978 c. 285 § 1102, now codified as 12 O.S.1981, § 3102),[5] we conclude the argument has no merit. The changes outlined above constituted changes in procedure only, and did not affect the substantive rights of the appellant. See, *Taylor v. State*, 640 P.2d 554 (Okl.Cr.1982). Thus, the appellant did not have a right to be governed by the prior statute, regardless of which one he thought to be in force. See, *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977); *Thompson v. Missouri*, 171 U.S. 380, 18 S.Ct. 922, 43 L.Ed. 204 (1898).

[9] In addition to his argument concerning the repealed 12 O.S., § 385, the appellant argues that Laws 1957, p. 167, § 1, codified as 22 O.S., § 702 (now repealed) should have controlled the admissibility of the evidence concerning the conversations he had with Verna. Section 702, which was still valid at the time of the appellant's trial, was more restrictive than 12 O.S.1981, § 2504, which was also in force. The evidence would not have been admissible under Section 702. However, as we stated in *Taylor v. State*, supra; and *Lavicky v. State*, 632 P.2d 1234 (Okl.Cr.1981), it is our opinion that Section 702 was superceded by Section 2504. We note that the legislature has subsequently repealed § 702 (Laws 1982, c. 269, § 2, effective October 1, 1982), thereby lending force to our conclusion.

We therefore conclude that the sole statute controlling the admissibility of the conversations had between the appellant and his wife was 12 O.S.1981, § 2504. Having settled that issue, we turn now to our determination of whether the evidence was properly admitted under that statute.

Section 2504(B) limits the marital privilege in criminal cases to "confidential communications." According to Section 2504(A),

> A communication is confidential for purposes of this section if it is made privately by any person to his spouse and is not intended for disclosure to any other person.

See also, *Lavicky v. State*, supra.

[10–12] In the present case, the conversations to which Verna Stafford testified all occurred in the presence of Harold Stafford. None of the conversations she testified to fell under the above definition of confidential communications. We are convinced that Verna Stafford's testimony was properly admitted at trial.[6]

[13] We also find that the argument between the appellant and Verna, which

5. The statute governing the admissibility of Husband-Wife communications is 12 O.S.1981, § 2504. Title 12 O.S.1981, § 3102 is the repealer which serves to facilitate the authority of § 2504.

6. The appellant argues this reasoning improperly permits the "bootstrapping" of Verna Stafford's testimony, because the only way to prove the conversations were not confidential under § 2504(A) and (B) was to allow Verna to testify they were not.

We would first point out that the bulk of Verna Stafford's testimony concerned overt acts committed by the appellant, Harold and herself. These acts did not constitute confidential communications. See, *Pereira v. United States*, 347 U.S. 1, 74 S.Ct. 358, 98 L.Ed. 435 (1954); *Wolfle v. United States*, 291 U.S. 7, 54 S.Ct. 279, 78 L.Ed. 617 (1934); *United States v. Lustig*, 555 F.2d 737 (9th Cir.1977). Thus, there is no marital privilege issue involved with most of Verna's testimony.

The substance of Verna's testimony concerning the conversations had in Harold's presence was that the three met several times at a Tulsa restaurant to discuss their financial problems, and that after obtaining a gun, conspired to commit a robbery in Oklahoma City. Verna was under oath when she testified to these matters. Her testimony in other areas was corroborated by other witness' testimony. We have held that if the testimony of an accomplice is corroborated in one material fact by independent evidence tending to connect the defendant to the crime, it may be inferred by the trier of fact that the rest of his testimony is also true. *Nation v. State*, 478 P.2d 974 (Okl.Cr.1970).

We therefore believe the trial court was justified in permitting Verna to testify that Harold was present during certain conversations, and in allowing her to testify as to the substance of those conversations.

was overheard by a third party, was not a "confidential communication" within the meaning of Section 2504(A) and (B). The argument occurred in a hotel parking lot at midnight on July 17, 1978. It became so loud that it attracted the attention of a young woman who was staying in the hotel. The woman testified at trial as follows:

MS. HUFF:

Q. What do you remember happening and what was being said?

WITNESS:

A. Well, I heard yelling, and I looked out the window and I saw it was Verna, you know, and Roger.

And I saw Roger slap Verna real hard, and she went back against the car. I opened the door, and—just a little bit and was watching. And I heard Verna yell she was going to call the police and Roger says, "Go ahead. You'll be in as much trouble as I would." She goes, "But I didn't kill them, Roger. You did."

It is clear in this case that the appellant was conducting himself in a loud manner in a place where he could have no reasonable expectation of privacy. Under these circumstances, the rule espoused in the case of *Seigler v. State*, 54 Okl.Cr. 141, 15 P.2d 1048 (1932) that, "... third persons may testify to communications had between husband and wife, overheard by such third persons," (15 P.2d at 1048) applies.[7] Accordingly, the witness' testimony was properly admitted.

In the appellant's eleventh assignment of error, he argues that Verna Stafford was improperly permitted to testify concerning statements made by Harold Stafford. Harold was killed in a motorcycle accident prior to the appellant's arrest, and was thus unavailable for trial.

[14] It was the trio's journey in search of something or someone to rob which culminated the murders. Harold conspired with the appellant and Verna to embark upon such an endeavor. Thus, the testimony concerning conversations in which statements were made by Harold falls under 12 O.S.1981, § 2801(4)(b)(5):

4. A statement is not hearsay if:

b. the statement is offered against a party and is

5. a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

The testimony was properly admitted.

Two persons who identified the appellant from photographic lineups testified at the appellant's trial. Both of these persons had been hypnotized prior to viewing the photographs. The appellant argues their testimony was improperly admitted. We disagree.[8]

As part of the State's proof that the appellant was in the area of the Lorenz murders at the time they took place, the testimony of Ray Tackett was introduced. Mr. Tackett testified that he saw a pickup matching the description of the Lorenz' pickup parked outside a Stillwater, Oklahoma convenience store at approximately 7:00 A.M. on June 22, 1978; that he was able to observe the driver of the vehicle and its male passenger; that he again saw the pickup parked outside a restaurant in Stillwater approximately thirty minutes later; that he saw the same two men inside the restaurant that he had seen at the convenience store; that a woman was with the men at that time; that upon learning of the deaths of the Lorenz family on June 22 and 23, he called the Stillwater police concerning the pickup and the persons he had seen; that he met with police on June 26 and related the information herein set forth; that on June 27 he met with an OSBI artist and drew a composite of the two men he had seen associated with the pickup; that approximately six months later he again met with the OSBI artist and drew a composite picture of the woman he

7. The appellant argues *Seigler* stands for a rule opposite than that stated above. A close reading of *Seigler* reveals the inaccuracy of his argument.

8. The appellant also argues that trial counsel's failure to object to the admission of this testimony evidences trial counsel's ineffectiveness. We have taken the argument into consideration in part III of this opinion, infra.

had seen with the two men; that on March 13 or 14, 1979, he met with OSBI agents and was hypnotized twice, once for "practice," and a second time to recall events which transpired the day he saw the pickup and three persons in question; and that he was shown the photographic lineup approximately 45 minutes after the second hypnotism session ended.

It is readily apparent that since the composites and descriptions had been given earlier, the hypnosis did not in any appreciable manner contribute to Tackett's identity of the appellant at the photographic lineup. Photographs were introduced at trial to show the similarity between the composites drawn at Tackett's direction and the actual appearances of the appellant, Verna Stafford, and Harold Stafford.

Pamela Lynch testified she saw the appellant in an automobile on Interstate 240 in Oklahoma City on July 16, 1978. Subsequent to being hypnotized, she also selected the appellant's photograph from a series of photographs. However, as in the case of witness Tackett, all of Ms. Lynch's descriptions of the appellant were given to the police beforehand. There was no error in admitting the testimony under the particular facts of this case.

This Court is aware of its holding in *Jones v. State*, 542 P.2d 1316 (Okl.Cr.1975), and we do not intend to imply today that we depart from the principles therein set forth. The information supplied by these two witnesses most damaging to the appellant was that adduced prior to the hypnosis. Indeed, in the case of Mr. Tackett, the composites prompted the appellant himself to call the police and identify Harold and Verna. It was the appellant's phone call which then set in motion the events which culminated in his arrest.

[15] In light of the overwhelming amount of evidence of the appellant's guilt, we cannot say that the identification of the appellant in a photographic lineup by two witnesses with so much independent information resulted in error or prejudice meriting reversal or modification.

The appellant maintains five photographs of the deceased victims' bodies were improperly admitted into evidence at trial.

[16, 17] Photographs are admissible in criminal trials so long as they are relevant, and their probative value to the jury outweighs their prejudicial impact. 12 O.S. 1981, §§ 2401, 2403. It is within the discretion of the trial court to determine the admissibility of photographs, based on the above standards. *Irvin v. State*, 617 P.2d 583 (Okl.Cr.1980). We will not disturb the trial court's decision absent abuse of that discretion. *Grizzle v. State*, 559 P.2d 474 (Okl.Cr.1977).

[18] The photographs of the victims' bodies as they lay in the fields where they were found demonstrated where and how the bodies were disposed of following the murders. The pictures of Mr. and Mrs. Lorenz taken after they were cleaned up served to demonstrate the points of entry and the nature of the gunshot wounds which caused their death. All the photographs were relevant to the issues at trial, were probative of the crime committed, and were not unduly prejudicial. They were properly admitted. *Glidewell v. State*, 626 P.2d 1351 (Okl.Cr.1981); *Chaney v. State*, 612 P.2d 269 (Okl.Cr.1980).[9]

The appellant next contends that evidence of other crimes was erroneously introduced at his trial.

The prosecutor elicited testimony from the appellant at trial that he had married a second woman while being married to Verna Stafford. The trial court sustained the appellant's objections. Nonetheless, appellate counsel argues the error was fundamental, thereby mandating reversal.

9. The appellant argues that the two pictures of Mr. and Mrs. Lorenz as they lay in the morgue were similar to those condemned in *Oxendine v. State*, 335 P.2d 940 (Okl.Cr.1958). We find, however, that the photographs did not approach the prejudicial magnitude of the Oxendine autopsy photographs. The pictures in this case show no signs that an autopsy had been performed. The only wounds visible were those caused by the bullets fired by the appellant.

[19, 20] We cannot agree that the fact that evidence was brought out that the appellant was a bigamist prejudiced him in this case. The issues before the jury concerned the brutal murder of a family. Much evidence was produced which demonstrated the heartless and heinous manner in which the three deaths were effected at the hands of the appellant. Evidence concerning the appellant's marital misbehavior, to which an objection was sustained, played no prejudicial role in the appellant's judgment and sentences.

Accordingly, we find that this evidence, and the trial court's failure to instruct the jury, constituted harmless error. See, *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Lemos v. State*, 642 P.2d 279 (Okl.Cr.1982).[10]

III. EFFECTIVENESS OF TRIAL COUNSEL

The appellant's tenth allegation of error is that trial counsel, Mr. J. Malone Brewer, rendered ineffective assistance. The argument is premised on two grounds: first, that Brewer's representation as a whole was ineffective; and second, that Brewer had contracted with the appellant for all publication rights to the appellant's life, thereby creating a conflict of interest which impaired the effectiveness of Brewer's representation at trial.

A. COUNSEL'S REPRESENTATION AS A WHOLE

[21, 22] From the outset, we note that the standard by which trial counsel's performance is to be judged is the "farce or mockery of justice" test which existed at the time of the appellant's trial.[11] *Webb v. State*, 612 P.2d 285 (Okl.Cr.1980). The burden of establishing ineffective assistance at trial is upon the defendant, and is a heavy burden. *Felts v. State*, 588 P.2d 572 (Okl. Cr.1978).

[23] The appellant has argued at length in his brief and upon oral arguments the ineffective assistance allegation. In addition to the one argument devoted solely to the issue the appellant has punctuated the entire brief with examples from the transcript intended to support his claim. Many of the instances cited by the appellant, however, are addressed to trial counsel's personal style, which we refuse to "second guess" on appeal. The appellant's burden of proving he was not adequately represented at trial is not sustained by demonstrating possible error in trial counsel's judgment. *Felts*, supra; *Walker v. State*, 550 P.2d 1339 (Okl.Cr.1976).

[24] The fact that trial counsel failed to properly move for a change of venue, failed to move to suppress the testimony of various witnesses, and failed to draft a comprehensive motion for new trial is of no consequence; as we have considered all allega-

10. The appellant also alludes in his argument to testimony given by witnesses Jones, Lynch, Baxter, Childers and Collins. An examination of the testimony of those witnesses, however, reveals that the argument has no merit.

Witnesses Jones, Childers and Baxter were all co-workers of the appellant who identified weapons the appellant had shown them in June or July of 1978. The weapons identified by the three were those which were used in both the Lorenz murders and the "Sirloin Stockade murders." The fact that the weapons had been used in the "Sirloin Stockade murders" and introduced into evidence against the appellant in that trial did not constitute evidence of other crimes here. The weapons and the testimony connecting them with the appellant in this case was limited to implicating the appellant in the Lorenz murders. There was no error.

Witness Collins also identified the three guns as those which she had seen under the appellant's bed as she made it one day at a Tulsa motel. Her identification of the weapons did not constitute evidence of other crimes.

Witness Collins also testified she saw the appellant, Verna and Harold in a car that matched the description of the one given by witness Pamela Lynch on July 16, 1978. Although July 16 was the day on which the "Sirloin Stockade murders" occurred, neither Collins' nor Lynch's testimony went to that fact. This testimony successfully avoided touching on the subject of other crimes.

11. The "farce or mockery" test was replaced in Oklahoma by the "reasonably competent assistance of counsel" test in October of 1980. See, *Johnson v. State*, 620 P.2d 1311 (Okl.Cr. 1980). The appellant's trial was held in May of 1980.

tions on their merits, and have concluded that all the testimony was properly admitted.

Of most concern to us is the appellant's argument concerning Mr. Brewer's representation during the sentencing stage. The appellant argues that Brewer's conduct fell short of the "Farce or Mockery of Justice" standard because; 1) he objected to the instructions after they were given; 2) he presented no evidence in mitigation of the death sentence; and 3) his closing argument was only three transcript pages in length.

[25] We must evaluate the appellant's objections in light of the sentencing hearing as a whole. Although it is proper for counsel to object to instructions *before* they are given, failure to do so in this instance was not error. Appellate counsel's only challenge to the propriety of the instructions have been considered and rejected in part IV of this opinion, infra. Thus, it would have merited the appellant nothing had a timely objection to the instructions been made.

[26, 27] Secondly, both the State and the appellant incorporated the evidence presented in the first stage as evidence in the second stage. No additional witnesses were adduced by either side. The appellant has failed to demonstrate that any mitigating evidence other than that adduced in the first stage was available. Appellate counsel has asserted the appellant had a brain tumor at the age of twelve, and implied that such a condition may have resulted in psychiatric problems. However, no evidence to substantiate this claim has been produced, and we shall not accept counsel's assertion.[12] See, *Smith v. State*, 659 P.2d 330 (Okl.Cr.1983). See also, *Collins v. State*, 271 Ark. 825, 611 S.W.2d 182 (1981).

[28] Thirdly, the brevity of Mr. Brewer's argument in the sentencing stage does not convince us that it was ineffective. The length of the argument paralleled that of the prosecution. The substance contained philosophical and factual arguments concerning the appropriateness of the death penalty in this case. Portions of the argument referred to the appellant's alibi presented in the first stage.

Although the argument may not have been the model closing argument, we cannot judge it by its lack of success. *Smith v. State*, supra. It is to be remembered that trial counsel had the unenviable task of defending a man against whom the State had amassed a great amount of evidence. Brewer conducted a vigorous defense in the first stage, and reurged his position in the second. Brewer's representation was adequate. *Webb*, supra; *Felts*, supra, *Smith*, supra.

B. THE ALLEGED CONFLICT OF INTEREST

This issue presents a matter of great ethical and judicial concern. The American Bar Association Code of Professional Responsibility specifically prohibits counsel from acquiring an interest in publication rights concerning the matter for which he is employed prior to conclusion of that matter.[13] It is, however, for the Bar to determine the necessity of any disciplinary action pursuant to DR 5-104(B). Our concern in the matter lies in ensuring the appellant's sixth amendment right to adequate representation was protected.

[29] To afford relief to the appellant upon these grounds, it must be established

12. The appellant ties this argument to the conflict of interest argument (See B, infra), and asserts that Brewer presented no evidence concerning this matter because Brewer failed to keep his end of the agreement and finance the defense. We have considered the conflict aspect in part B. We note here that appellate counsel has likewise failed to offer any authority to show that the appellant had any history of psychiatric disorder.

13. DR 5-104(B) states:

> Prior to conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment.

that an *actual*, not a *possible*, conflict of interests existed. *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).[14] Further, it must be established that the actual conflict of interest adversely affected the attorney's performance.[15] *Cuyler v. Sullivan*, supra.

[30] The only evidence in the record supporting the contention that Brewer exchanged his services for the publication rights to the appellant's life story is the affidavit of the appellate attorney, Garvin A. Isaacs.[16] We do not believe that this affidavit, standing alone, is sufficient to establish an actual conflict of interest.

[31] Nonetheless, even were we to assume, *arguendo*, that Brewer had obtained an interest in the publication rights concerning this matter, and that it created a conflict of interest, the appellant is unable to show Brewer's representation was adversely affected thereby.

The appellant attempts to demonstrate an adverse effect by asserting that: 1) Brewer allowed television cameras at the appellant's trial in search of publicity for himself; and 2) the failure to investigate the appellant's psychiatric background (hence the failure to present such a mitigating circumstance) was directly attributable to the alleged contract, because Brewer was supposed to finance such endeavors and failed to do so.

The first argument has no merit, since the appellant personally consented to the presence of the television cameras. (See transcript of proceedings, February 25, 1980 at p. 4). In addition, the appellant has demonstrated no adverse effect from the presence of the television cameras. The jury was sequestered by the court and had no access to the reports produced from the films. There is no evidence of any extraordinary or flamboyant tactics employed by Brewer at trial, or conversely, that he was withdrawn. It simply cannot be said that the television cameras had an adverse effect on Brewer's performance.

The second argument must also fail, since, as stated in part A, supra, no evidence has been offered to establish that the appellant had any history of mental illness.

Lastly, we find this case distinguishable from *People v. Corona*, 80 Cal.App.3d 684, 145 Cal.Rptr. 894 (1978), cited by the appellant.

In *Corona*, it was proven that a publication contract between the defendant and his attorney existed, and a copy was available to the court. Counsel's actions in that case revealed the contract had definite adverse effects on his legal representation of Coro-

14. Although Sullivan sought federal habeas corpus relief from a state conviction, and the conflict of interests alleged stemmed from multiple representation in *Cuyler v. Sullivan*, the holding has been applied to a case similar to the present. See, *United States v. Hearst*, 638 F.2d 1190 (9th Cir.1980).

15. Older cases have established that prejudice must be shown to result from the conflict of interest in situations where counsel has obtained publication rights prior to conclusion of the representation giving rise to the publication contract. See, *Fuller v. Israel*, 421 F.Supp. 582 (E.D.Ill.1976); *Ray v. Rose*, 535 F.2d 966 (6th Cir.1976); *United States v. Hearst*, 466 F.Supp. 1068 (N.D.Cal.1978) (Vacated and Remanded, 638 F.2d 1190 (9th Cir.1980)); *People v. Corona*, 80 Cal.App.3d 684, 145 Cal.Rptr. 894 (1978);

It was stated in *United States v. Hearst*, 638 F.2d 1190, that the "prejudice" requirement is not the same as the "adverse effect" test of *Cuyler v. Sullivan*:

> But the requirement that the petitioner show this adverse effect is not the same as the requirement that the petitioner show that counsel's incompetent assistance resulted in actual prejudice. For example, overwhelming evidence of guilt might make almost impossible a showing that a relatively minor error resulted in actual prejudice. But such evidence would be completely irrelevant to an inquiry whether the same error, if caused by an actual conflict of interest, showed an adverse effect on counsel's performance. 638 F.2d at 1194.

16. Appendix B contains an excerpt from the transcript in which Brewer is arguing his motion to be compensated for representing the appellant. He makes several references to the contingency that he "could or might" receive compensation. We are not prepared to say these statements are references to potential proceeds from publication rights.

na. Counsel actively sought media coverage during the trial, which behavior prompted the trial court to verbally chastise him on at least two occasions. (145 Cal. Rptr. at 918). In the appellate court's words, "... defense counsel engaged in continuous conduct to try the case in the press, regardless of the fact that the trial publicity was injurious to the interest of his client." (145 Cal.Rptr. at 918).[17]

Brewer's conduct in the present case was clearly not as egregious as the conduct of Corona's attorney. Throughout the trial Brewer made objections, argued points of law, vigorously cross-examined witnesses and attempted to establish an alibi with witnesses for the defense. Although he agreed to the presence of television cameras in the courtroom during the trial, he did not attempt to try the case to the press. We have thoroughly reviewed the record in light of *Corona* and the appellant's allegations and are convinced the appellant received effective assistance of counsel at trial. *Webb*, supra.

IV. THE PUNISHMENT STAGE

[32] The appellant argues that 21 O.S. 1981, § 701.11 unconstitutionally shifts the burden of proof to the defendant in capital cases by requiring him to present evidence in mitigation of the death penalty. In *Parks v. State*, 651 P.2d 686 (Okl.Cr.1982), we held that our statutory scheme did not unconstitutionally shift the burden of proof. In the present case, the jury was properly instructed concerning the aggravating circumstances, the mitigating circumstances, and the burdens of proof associated therewith. The assignment of error cannot stand.

[33, 34] The appellant also argues a preliminary hearing on the aggravating circumstances should have been held. We rejected an identical argument in *Brewer v. State*, 650 P.2d 54 (Okl.Cr.1982). Preliminary hearings on the bill of particulars in capital cases are not required.

The appellant additionally maintains fundamental error occurred when the sentencing stage of his trial was not conducted according to the procedure outlined in 22 O.S.1981, § 831.

Immediately after the verdicts of guilt were returned and the jury polled concerning that matter, the trial court read the instructions regarding punishment to the jury. The State then moved to incorporate all the evidence introduced in the first stage into the second stage, and rested. The defense announced it had no evidence to present and rested. The State made its closing argument to the jury, as did the appellant. The State argued in rebuttal, and the jury was sent out to deliberate on the sentence to be imposed.

The appellant argues this procedure was erroneous because 1) the trial court afforded the parties no opportunity to make opening statements; 2) the appellant was given no opportunity to cross-examine witnesses against him by virtue of the State merely incorporating the evidence adduced in the first stage into the second stage; and 3) no opportunity was given the appellant to demur to the evidence.

Title 21 O.S.1981, § 701.10 provides for the separate sentencing stage upon conviction or adjudication of guilt of murder in the first degree. It directs that the State be limited to introduction of evidence in support of the aggravating circumstances enumerated in 21 O.S.1981, § 701.12; and that the defendant be allowed to present evidence concerning any mitigating factors. It also provides that both sides be permitted to present argument for or against imposition of the sentence of death.

17. In addition to Corona's trial counsel's conduct directly attributable to the contract for publication rights, the court based its decision on the fact that substantial evidence of Corona's mental illness was deliberately ignored by trial counsel. The evidence of Corona's mental illness was so strong, and defense counsel's determination to suppress it so great, that the improbable circumstance occurred wherein the trial court and the prosecution demanded Corona undergo psychiatric testing, while the defense vehemently objected. The court could not excuse counsel's behavior as a matter of trial strategy.

[35] The appellant was afforded all the protection and opportunity created by 21 O.S.1981, § 701.10. The fact that he did not call any witnesses on his own behalf or recall any witnesses from the first stage cannot be attributed to the procedural format of the sentencing stage.[18] The appellant was allowed to argue against imposition of the death penalty in compliance with Section 701.10.

We cannot agree that the appellant was prejudiced or denied any substantive or procedural rights by the manner in which the sentencing was conducted.

Lastly, we consider the sentences assessed by the jury for the appellant's crimes in light of 21 O.S.1981, § 701.13(C).

[36] We are convinced that the jury did not impose the appellant's sentences of death under the influence of passion, prejudice or any other arbitrary factor. The record is devoid of prejudicial conduct or remarks which have prompted this Court to modify or reverse death sentences in the past. The appellant received a fair trial in both stages.

[37] Secondly, we are convinced the evidence incorporated into the second stage adequately supported the aggravating circumstances found by the jury. The jury found the aggravating circumstances in the murders of Linda and Richard Lorenz to be: 1) that the appellant knowingly created a risk of death to more than one person; 2) that the murders were especially heinous, atrocious or cruel; 3) that the murders were committed for the purpose of avoiding or preventing a lawful arrest or prosecution; and 4) that there existed a probability the appellant would commit criminal acts of violence that would constitute a continuing threat to society. The jury found all the aggravating factors but number three existed in the appellant's murder of Melvin Lorenz.

Immediately after having shot Melvin Lorenz, the appellant opened fire on Linda, and then stalked his third victim, young Richard Lorenz, as he lay crying in the darkness. These facts amply support the aggravating circumstance that the appellant created a risk of death to more than one person. See, *Jones v. State*, 648 P.2d 1251 (Okl.Cr.1982); *Hays v. State*, 617 P.2d 223 (Okl.Cr.1980); *Chaney v. State*, supra.

Likewise, all three murders were especially heinous, atrocious and cruel. The unprovoked murders committed upon a family who had taken time as they made their way to the funeral of a loved one to stop and help a fellow citizen were "extremely wicked," "shockingly evil" and "outrageously wicked and vile." See, *Eddings v. State*, 616 P.2d 1159 (Okl.Cr.1980); *Parks v. State*, supra.

The jury was justified in finding from the evidence adduced at trial that the murders of Linda and Richard Lorenz were committed to avoid or prevent lawful arrest or prosecution. Likewise, the jury was justified in its inference based on the calloused nature of the murders committed by the appellant, that there existed a probability he would commit future acts of violence.

[38] Thirdly, we have considered whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.[19] We conclude that the

18. The appellant has addressed the issue of trial counsel's performance during this stage of the trial in his ineffective assistance of counsel argument. We have considered the matter therein.

19. We have compared this case to other cases under our present murder statute in which the defendants' sentence of death has been affirmed: *Coleman v. State*, 668 P.2d 1126 (Okl.Cr.1983); *Davis v. State*, 665 P.2d 1186 (Okl.Cr.1983); *Stafford v. State*, 665 P.2d 1205 (Okl.Cr.1983); *Smith v. State*, 659 P.2d 330 (Okl.Cr.1983); *Ake v. State*, 663 P.2d 1 (Okl.Cr.1983); *Parks v. State*, supra; *Jones v. State*, supra; *Hays v. State*, supra; *Eddings v. State*, supra; (Reversed and remanded for resentencing, 102 S.Ct. 869); *Chaney v. State*, supra.

We have also compared this case to other cases under our present murder statute in which the defendants' death sentence has been modified to life: *Jones v. State*, 660 P.2d 634 (Okl.Cr.1983); *Driskell v. State*, 659 P.2d 343 (Okl.Cr.1983); *Boutwell v. State*, 659 P.2d 322 (Okl.Cr.1983); *Munn v. State*, 658 P.2d 482 (Okl.Cr.1983); *Odum v. State*, 651 P.2d 703

penalties of death for each of the members of the Lorenz family are appropriate in this case.

Accordingly, the appellant's convictions of three counts of murder in the first degree and sentence of death for each count are hereby AFFIRMED.

CORNISH and BRETT, JJ., concur.

APPENDIX A

The trial transcript reads in pertinent part as follows:

THE COURT: Miss Smith, I'll ask you this question:

In a case where the law and the evidence warrant, in a proper case, could you, without doing violence to your conscience, agree to a verdict imposing the death penalty?

MRS. SMITH (Juror) No, sir, I could not.

MRS. HUFF: State would ask that the juror be excused for cause, Your Honor.

MR. BREWER: To which we will object, if the Court please.

THE COURT: I will ask you this question—and take up your matter at a later time, Miss Huff—Miss Smith, if you found beyond a reasonable doubt that the Defendant was guilty of Murder in the First Degree and if under the evidence, facts, and circumstances of the case the law would permit you to consider a sentence of death, are your reservations about the death penalty such that regardless of the law, the facts, and circumstances of the case, you would not inflict the death penalty?

MRS. SMITH: Well, I would do the best I could, but I'm afraid I couldn't.

THE COURT: It's my understanding from the substance of your remark that you could not assess the death penalty regardless of the evidence in the case, is that correct?

MRS. SMITH: Well, I said I would try to do—you know, listen to the evidence to the very best of my ability, but I'm, yes, afraid that I could not be fair in my judgment.

THE COURT: Do you feel like your mind is made up at this time, that you could not assess the death penalty in a proper case?

MRS. SMITH: I'm afraid it is, Your Honor, I'm afraid so.

THE COURT: And regardless of the evidence that was presented and the testimony from the witness stand, regardless of that, you could not assess the death penalty?

MRS. SMITH: I'm afraid I couldn't.

THE COURT: Miss Huff.

MRS. HUFF: Yes, I again appreciate your honesty and would ask that this juror be excused for cause, Your Honor.

MR. BREWER: To which we will object on the grounds of we object to the sole form of the question, on the ground that the Court is trying to impanel a jury to assess the death penalty instead of trial by jury of our peers. If the Court please, we would object strenuously to this.

THE COURT: Miss Smith, are you irrevocably committed to the belief that you could not assess the death penalty regardless of the evidence?

MRS. SMITH: Yes, sir, I am.

THE COURT: You may step down for cause.

APPENDIX B

MR. BREWER: Now, I have one final motion, if the Court please, at this time which I have served a copy upon the Court for motion for compensation, which

(Okl.Cr.1982); *Burrows v. State*, 640 P.2d 533 (Okl.Cr.1982); *Franks v. State*, 636 P.2d 361 (Okl.Cr.1981); *Irvin v. State*, 617 P.2d 588 (Okl.Cr.1980).

We are convinced that none of the factors which resulted in modification exist here.

We have considered this case in light of the facts of cases in which the defendants' convictions and sentences of death were reversed. *Hall v. State*, 650 P.2d 893 (Okl.Cr.1982); *Brewer v. State*, 650 P.2d 54 (Okl.Cr.1982); *Hager v. State*, 612 P.2d 1369 (Okl.Cr.1080). We find nothing in those cases which would dictate a result different from the one we reach today.

APPENDIX B—Continued

the Court is well-aware of that upon application of the Defendant, the Court declared him indigent, appointed me to represent him as his attorney at law.

Under the provisions of 21 O.S.1978, Section 701.14, provides for this for an amount of up to $2,500. I have attached a time sheet to my application showing the Court that I had 142 hours minimum. That's accountable time already involved in the case, this one particular case. I ask the Court for compensation in the amount of $2,500.

Now, for the Court's own record, there has been a lot of speculation in the news media of statements that I have intentions of profiting, making profit financially from representation of Roger Stafford. At this time I serve notice upon the Court that in the event I should directly receive monetary compensation from the representation of Roger Stafford in the particular case before the Court here, being the Lorenz family case, that I will reimburse the State the full $2,500 plus a reasonable amount of interest that would accrue on that money, if in the event I should make or any of this money comes my way.

There is no—we have no definite plans at this time on anything, but I wanted to assure the Court, and I wanted to assure the Supreme Court and the Legislature and the people that this fund was set up primarily for the purpose that we're using it for.

I do not feel like under these guidelines by the Court that I am obligated in any manner to refund to the State of Oklahoma or to the people any of this $2,500 because the man was indigent at the time. What I do at a later date is my personal business. But for the Court's own feelings and my feelings as well, I assure the Court that I will reimburse the State in the event of what, I said occurs, plus reasonable interest.

Further, I do not mind accounting to the Oklahoma State Bar Association in a memorandum, say, written on a yearly basis advising the Bar Association as to whether or not I have or have not received any compensation in this matter.

I don't want to get it to where I would have to account, say, once a month, which would be very troublesome; but say, once a year I would—I do not mind making financial disclosures to the Bar Association as to any monies received out of this case or any directly relating to this case.

What I am trying to do, if the Court please, is just to assure the Court that the monies are earned in the professional capacity as the Legislature intended; and in the event something should occur, I would be more than grateful to refund the money to the State of Oklahoma.

We don't have any anticipation of that. We don't have any promises of that. We don't—It's not like I'm sitting here knowing there is money coming. We don't know. I anticipate keeping the money, using it in my law practice, and at this time do not have any indications of any other funds whatsoever coming. But I wanted the Court to be aware of that because it had been brought up, and I think it's important that the Court know.

I have also, in this, filed my motion. I have attached for the Court's benefit for their consideration a summary of hours. I did even prepare the standard order that is set forth in Statute. And at this time I am requesting the Court by law and through their appointment to compensate Court-appointed defense counsel in the sum of $2,500.

As the Court's well-aware of the amount of work that's gone into that, $2,500 will not even scratch the surface of the amount of time and effort that has gone into this case.

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ROGER DALE STAFFORD, SR.,)
:
Petitioner,)
:
-vs-) No. F-80-256
:
THE STATE OF OKLAHOMA,)
:
Respondent.)

ORDER DENYING PETITION FOR REHEARING

Petitioner has re-asserted upon his petition for rehearing that a contract allegedly entered into between himself and his trial counsel, J. Malone Brewer, deprived him of effective assistance of counsel. The authority upon which petitioner relies, People v. Corona, 80 Cal. App. 3rd 684, 145 Cal. Rptr. 894 (1978), was discussed and distinguished in this Court's opinion affirming the petitioner's conviction. See, Stafford v. State, 54 OBAJ 2402, _____ P.2d _____ (Okl.Cr.1983). Having considered petitioner's premises, this Court finds the petition for rehearing should be, and the same is hereby DENIED. The Clerk of this Court is directed to issue the mandate forthwith.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 12 day of October, 1983.

Hez J. Bussey
HEZ J. BUSSEY, PRESIDING JUDGE

Tom R. Cornish
TOM R. CORNISH, JUDGE

Tom Brett
TOM BRETT, JUDGE

ATTEST:

[illegible]
Clerk

Appendix B

Supreme Court of the United States

No. A-418

ROGER DALE STAFFORD,

Petitioner,

v.

OKLAHOMA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 4, 1984.

/s/ Byron R. White

Associate Justice of the Supreme Court of the United States

Dated this 1st day of December, 1983.

Appendix C

TIME SHEET

THE STATE OF OKLAHOMA vs. ROGER DALE STAFFORD, SR.

CASE NUMBER: CRF-7[illegible]-[illegible]

PRELIMINARY HEARING	15 HOURS
PREPARATION OF MOTIONS	25 HOURS
MOTIONS	9 HOURS
TRIAL	[illegible] TRIAL WEEKS)
[illegible]	2[illegible] HOURS
[illegible]	1[illegible] HOURS
TOTAL	[illegible] HOURS

[signature]

MALONE BREWER
ATTORNEY AT LAW

Exhibit D

Best Copy Available

83-6

IN THE SUPREME COURT OF THE UNITED STATES

ROGER DALE STAFFORD,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

Case No. A-418

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 46 of the Rules of this Court, Petitioner Roger Dale Stafford Jr., asks leave to file the Petition for a Writ of Certiorari mailed to the Clerks office on January 4, 1984, to the Supreme Court of the United States without prepayment of costs and to proceed in forma pauperis. The Petitioner, Roger Dale Stafford's affidavit in support of this motion is attached hereto.

Dated this the _____ day of _____, 1984.

Charles B. Grethen
Attorney for Petitioner
P.O. Drawer D
Purcell, OK 73080

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the above and foregoing **Motion for Leave to Proceed in Forma Pauperis** was mailed to the Attorney General in and for the State of Oklahoma at this 19th day of January, 1984.

Charles B. Grethen

83-6

IN THE SUPREME COURT OF THE UNITED STATES

ROGER DALE STAFFORD, Petitioner,	)	
-vs-	)	Case No. A-418
THE STATE OF OKLAHOMA, Respondent.	)	

AFFADAVIT IN FORMA PAUPERIS

STATE OF OKLAHOMA)
) ss
COUNTY OF PITTSBURG)

Roger Dale Stafford, Sr., being sworn, says:

I

I am the Petitioner in this action.

II

I desire to take an appeal from a decision of the Oklahoma Court of Criminal Appeals entered on the 6th day of October, 1983, denying my petition for rehearing and petition this Honorable Court for Writ of Certiorari, to review said decision and the affirming a conviction for murder.

III

I believe that I am entitled to reversal of the judgment on the following grounds:

1. I was tried in the District Court of McClain County, and found guilty of three counts of murder and I feel that my trial counsel was ineffective.

2. I believe that the Statutes of the State of Oklahoma namely 21 O.S. 701.7 and subsequent are unconstitutional in that they deny me my equal protection under the law and that the punishment is cruel and inhuman.

3. That at the trial my wife was allowed to testify over my objection, and this violated my Constitutional rights under the 5th and 14th Amendment and my right to equal protection under the law and the right to remain silent.

IV

I have no funds with which to either pay court costs and fees. I have been appointed lawyers to represent me in the past. My trial counsel and appellant counsel at the state level were court appointed. I presently have a court appointed lawyer.

CHARLES B. GRETHEN
DOYLE E. BLYTHE
ATTORNEYS AT LAW
113 1/2 N. SECOND
STREET, DRAWER C
PURCELL, OKLAHOMA
73080
405-527-5511
405-238-1730

I am an indigent in that I have been incarcerated since the early part of 1979, and have no family, friends or relatives that are able to assist me in paying attorney fees, court costs and fees. I am presently incarcerated at the Oklahoma State Penitentiary, at McAlester, Oklahoma, on death row, waiting execution and have no means of support and expect no money or property to be received by me. Therefore I am unable to pay court costs and fees or expenses connected with the preparation of the record on appeal, printing of copies of motions, briefs etc... and have been unable to give security for any court costs and fees.

Roger Dale Stafford, Sr.

Subscribed and sworn to before me this ___ day of _____, 1984.

Notary Public

My Commission Expires:

_____

CHARLES B. GREFFENIUS
DOYLE B. BLYTHE
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